

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2008 Session

BARBARA ANN FAILEY v. KEVIN MARK FAILEY

**Appeal from the Chancery Court for Maury County
No. 02-751 Stella Hargrove, Judge**

No. M2006-02510-COA-R3-CV - Filed April 7, 2008

In this divorce action, Wife appeals contending the trial court erred in its award of alimony and in the division of marital property. The trial court awarded Wife transitional alimony in the amount of \$250 per week for a period of three years, awarded her \$5,000 in attorney's fees, and divided the marital estate. Wife contends on appeal that the trial court erred in not awarding her alimony *in futuro* and the full amount requested for attorney's fees, and that she should receive a greater percentage of the marital estate. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Barbara Ann Failey.

L. Samuel Patterson, Columbia, Tennessee, for the appellee, Kevin Mark Failey.

OPINION

Kevin Mark Failey ("Husband") and Barbara Ann Failey ("Wife") were married on June 1, 1979, in the state of New York. The parties moved to Columbia, Tennessee, in August of 1994 when Husband began working at the Saturn Plant in Spring Hill, Tennessee.

Husband worked for General Motors throughout the parties' marriage. Wife, who had completed one year of college, worked at a bank from 1979 until 1991, and then did not work again until 1997, three years after the parties had moved to Tennessee. From 1997 to 2004, Wife worked for various companies primarily doing clerical work and making between \$10 to \$12.50 per hour.

In December of 2002, Wife filed for divorce on the grounds of inappropriate marital conduct and adultery. After a failed attempt at reconciliation, Wife reinstituted the original divorce

complaint, and the matter went to trial on September 25, 2006.¹ At trial, the court considered the issues of “grounds [for divorce], distribution of limited personal property, disposition of the marital residence, allocation of marital debt, alimony for Wife, and Wife’s attorney’s fees.”

On October 11, 2006, the trial court issued a Memorandum Opinion and set out detailed findings of fact and conclusions of law on each contested issue. Specifically, the trial court granted a divorce to Wife upon the grounds of inappropriate marital conduct of Husband. In distributing the marital property, the trial court noted Wife’s mental health issues and current unemployment, but the court disputed Wife’s contention that Husband’s affair “pushed her over the edge” and that she is unable to maintain permanent employment. Wife’s assertion of being “over the edge” was supported by the clinical psychologist she saw while in Colorado, who stated she may require additional counseling prior to entering the work force. The trial court, however, which had found Wife to not be a credible witness, concluded that Wife had deceived the psychologist by exaggerating her emotional problems. The court also concluded that Wife could secure and maintain gainful employment and that her earning capacity was \$11 an hour, at a minimum.

In the division of marital property, Wife received cash of \$24,755, representing half of the equity in the home, the automobile she drove and all personal property in her possession, and half of Husband’s pension and savings that had accumulated during the marriage. As for his part, Husband received the marital residence, his automobile and all personal property in his possession, and he was required to pay all debts on the Statement of Income and Family Expenses he had filed. As for debts, Wife was ordered to pay her credit card debts, and a debt of \$18,000 Wife claims to owe her sister. Finding Wife was in need of transitional alimony, the trial court awarded Wife alimony of \$250 per week for a period of three years. Wife was also awarded COBRA insurance for three years, which was to be paid by Husband. In addition, the trial court awarded Wife \$5,000 for her attorney’s fees, which she claimed were in excess of \$12,000. This appeal followed.

STANDARD OF REVIEW

The standard of review of a trial court’s findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court’s finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we “must conduct our own independent review of the record to determine where the preponderance of the evidence lies.” *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court’s determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37

¹The matter was originally set for trial on April 26, 2006. However, Wife filed two motions to continue that ultimately led to the matter being held in September of 2006.

S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

TRANSITIONAL ALIMONY

Wife contends the trial court erred by not awarding her alimony *in futuro*. The trial court awarded Wife transitional alimony in the amount of \$250 per week and COBRA insurance benefits, each of which was for a period of three years. We find no error with this decision.

There are no hard and fast rules for spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682-683 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Alimony decisions require a careful consideration of the relevant factors in Tenn. Code Ann. § 36-5-121(i) and typically hinge on the unique facts and circumstances of the case. *See Anderton*, 988 S.W.2d at 683; *see also Hawkins v. Hawkins*, 883 S.W.2d 622, 625 (Tenn. Ct. App. 1994).

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. *See Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). Therefore, appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

The amount, if any, and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case, therefore, appellate courts will not alter such awards absent an abuse of discretion. *Riggs v. Riggs*, No. M2006-02754-COA-R3-CV, 2007 WL 4117782 at *2 (Tenn. Ct. App. Nov. 16, 2007) (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)).

The relevant factors to be considered under Tenn. Code Ann. § 36-5-121(i) when determining whether to award alimony include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

While a trial court should consider all the relevant factors under the circumstance, the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs*, 2007 WL 4117782 at *3 (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002)). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Id.* (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)).

Once the trial court has determined that spousal support is appropriate, it must determine the nature, amount, and period of time of the award. Under Tennessee law, a "court may award rehabilitative alimony, alimony *in futuro*, also known as periodic alimony, transitional alimony, or alimony *in solido*, also known as lump sum alimony or a combination of these" Tenn. Code Ann. § 36-5-121(d)(1).

Wife contends the trial court erred in failing to award her alimony *in futuro*. Alimony *in futuro* is to be awarded where rehabilitation is *not feasible* as compared to an award of transitional alimony where rehabilitation is *not necessary*. See Tenn. Code Ann. § 36-5-121(d)(4)(emphasis added). The Tennessee General Assembly has stated a preference for rehabilitative alimony, when rehabilitation is feasible, "to enable an economically disadvantaged spouse to acquire additional education or training that will enable the spouse to achieve and maintain a standard of living comparable to the standard of living that existed during the marriage or to the post-divorce standard of living expected to be available to the other spouse." Tenn. Code Ann. § 36-5-121(d)(2); *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002); *Smith v. Smith*, 912 S.W.2d 155, 160 (Tenn. Ct. App. 1995)). The General Assembly has also declared, however, that when rehabilitation is not necessary, and the "economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce," the court should award transitional alimony instead. Tenn. Code Ann. § 36-5-121(d)(4).

"Transitional alimony" is statutorily defined as "a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time." Tenn. Code Ann. § 36-5-121(g)(1). The statute goes on to provide that transitional alimony is to be awarded when the court finds that "rehabilitation is not necessary, but the economically disadvantaged spouse needs

assistance to adjust to the economic consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection. . . .”² *Id.*

In the present case, the trial court found Wife to be the economically disadvantaged spouse and that Husband was able to assist her. The trial court’s decision followed its analysis of the statutory factors to be considered pursuant to Tenn. Code Ann. § 36-5-121, including the duration of the marriage, the ages of the parties, the physical condition of each party, the relative earning capacity, obligations, needs, and financial resources of each party, the relative education and training of each party and the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party’s earning capacity to a reasonable level, the provisions made with regard to the marital property, the standard of living established during the marriage, the extent to which each party has made such tangible and intangible contributions to the marriage, and the relative fault of the parties. The fact the trial court considered the statutory factors is evident from its memorandum opinion, which sets out specific findings as to the relevant factors.³ One of the more relevant specific findings by the trial court was that while “Wife maintains that she cannot work at the present time and needs extensive counseling. . . . [t]he record contains evidence to the contrary.” Moreover, the court noted that Wife had been performing volunteer work since 2004. The trial court also documented Wife’s work history and based upon that history found her earning capacity to be at a minimum of \$11 per hour.

The record reveals that Wife completed one year of college and has the requisite skills to obtain meaningful employment including but not limited to clerical work. As for her claimed inability to return to the workplace, the trial court found her to not be credible and that her claimed limitations were due to her inability to “consider anything short of Husband keeping her up, therapy, and her cats, which she describes as her world.” The foregoing notwithstanding, the trial court determined that Wife was in need of transitional alimony and, therefore, awarded her \$250 per week for a period of three years. Additionally, the trial court ordered Husband to pay the premiums for Wife’s COBRA insurance benefits for the same period, which constitutes an economic benefit to wife and, thus, reduces her financial need. *See Kemp v. Kemp*, No. 88-175-II, 1988 WL 116368, at

² Although not wholly unrelated, rehabilitative alimony and transitional alimony serve separate, distinct purposes. Rehabilitative alimony is distinguishable from other forms, including transitional alimony, for its purpose is to assist the disadvantaged spouse in achieving,

with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse’s standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(e)(1). Transitional alimony, however may be awarded when rehabilitation is not necessary, but “the economically disadvantaged spouse needs assistance to adjust to the economic consequences of divorce” Tenn. Code Ann. § 36-5-121(g)(1).

³ In its memorandum opinion, the trial court made findings as to the long-term nature of the marriage, the age and mental condition of the parties, the physical condition of the parties, and the distribution of the marital property.

*3 (Tenn. Ct. App. Nov. 2, 1988) (holding that the receipt of COBRA benefits constitutes a form of alimony).

Considering all of the above, we have determined the trial court considered the relevant statutory factors and that the evidence does not preponderate against the trial court's findings concerning the type, amount, and duration of alimony. We, therefore, affirm the trial court's decision concerning alimony.

WIFE'S ATTORNEY'S FEES

The next issue we address is whether the trial court erred in awarding Wife attorney's fees in the amount of \$5,000. An award of attorney's fees in a divorce case constitutes alimony *in solido*. *Anzalone v. Anzalone*, No. E2006-01885-COA-R3-CV, 2007 WL 3171132 (Tenn. Ct. App. Oct. 30, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996)). When determining whether to award attorney's fees, the trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i), cited above. *Echols v. Echols*, No. E2006-02319-COA-R3-CV, 2007 WL 1756711 at *7 (Tenn. Ct. App. June 19, 2007) (no Tenn. R. App. P. 11 application filed). Because awards of attorney's fees are within the sound discretion of the trial court, we will not disturb the award on appeal absent an abuse of discretion. *Anzalone*, 2007 WL 3171132 at *7 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002)).

The trial court found that "Wife has demonstrated a need for assistance with her attorney's fees," and further that "Husband has the ability to assist her" Finding no error with the trial court's determination that an award of attorney's fees of \$5,000 was reasonable under the circumstances, we affirm the award.

MARITAL PROPERTY

The final issue presented is whether the trial court erred in its division of the marital property. Dividing a marital estate necessarily begins with the classification of the parties' property as either separate or marital property. *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003); *Conley v. Conley*, 181 S.W.3d 692, 700 (Tenn. Ct. App. 2005); *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn. Ct. App. 1998). Questions regarding the classification of property as either marital or separate, as opposed to questions involving the appropriateness of the division of the marital estate, are inherently factual and we review a trial court's decisions classifying property using the standard of review in Tenn. R. App. P. 13(d).

Once a trial court has classified the property as either marital or separate, it should place a reasonable value on each piece of property subject to division, and the parties have the burden of proof to come forward with competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998); *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values represented by all the relevant valuation evidence. *Watters v. Watters*, 959 S.W.2d 585,

589 (Tenn. Ct. App. 1997); *Brock v. Brock*, 941 S.W.2d 896, 902 (Tenn. Ct. App. 1996). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231, and such decisions will not be second-guessed unless they are not supported by a preponderance of the evidence. *Smith v. Smith*, 93 S.W.3d 871, 875 (Tenn. Ct. App. 2002); *Ray v. Ray*, 916 S.W.2d 469, 470 (Tenn. Ct. App. 1995).

After the marital property has been valued, the trial court is to divide the marital property in an essentially equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). A division of marital property is not rendered inequitable simply because it is not precisely equal, *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002), *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996), or because each party did not receive a share of every piece of marital property, *Morton v. Morton*, 182 S.W.3d 821, 833-34 (Tenn. Ct. App. 2005); *Manis v. Manis*, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001).

Dividing marital property is not a mechanical process but rather is guided by carefully weighing the relevant factors in Tenn. Code Ann. § 36-4-121(c). *Flannary*, 121 S.W.3d at 650-51; *Tate v. Tate*, 138 S.W.3d 872, 875 (Tenn. Ct. App. 2003); *Kinard*, 986 S.W.2d at 230. Trial courts have broad discretion in fashioning an equitable division of marital property, *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004); *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983), and appellate courts must accord great weight to a trial court's division of marital property, *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996); *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1989). Accordingly, it is not our role to tweak the manner in which a trial court has divided the marital property. *Morton*, 182 S.W.3d at 834. Rather, our role is to determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the trial court's division of the marital property is equitable. *Jolly*, 130 S.W.3d at 785-86; *Kinard*, 986 S.W.2d at 231.

The manner in which the trial court divides the marital property cannot be considered without also considering the manner in which the trial court allocates the marital debt. Trial courts have not completely divided a marital estate until they have allocated both the marital property and the marital debt. *Robertson*, 76 S.W.3d at 341; *Anderton*, 988 S.W.2d at 679.

The parties' modest marital estate consists mostly of the marital home, Husband's General Motors pension plan, his savings, and the parties' debts. The parties dispute the net value of the marital estate. Wife argues that the value of the marital estate is \$87,927, and that she was entitled to at least half of that amount; however, she received \$38,577, or 43.87%. Husband counters Wife's argument, stating that her calculations are incorrect because her calculations include an alleged \$18,000 debt to Wife's sister.

Wife was awarded half of the equity in the marital home, all personal property in her possession, including a 2000 Grand Prix, and half of the marital assets of Husband's General Motors pension. Husband received half of the equity in the marital home, all personal property in his

possession, including a 2000 Explorer, and half of the marital portion of his General Motors pension. As for the parties' debts, the trial court ordered Husband responsible for the debt on his 2000 Explorer of \$4,811, the marital residence debt of \$80,000, the Chase credit card debt of \$4,940, and the Capital One credit card debt of \$5,217, and ordered Wife responsible for the Chase Visa credit card debt of \$4,741 and the \$18,000 "debt" Wife claims is owed to her sister.

When Wife's sister testified concerning the "loan" she gave Wife, the sister stated, "I have never told her that I expected her to pay me back." Without proof that she is indebted to her sister, the disputed \$18,000 "debt" cannot be considered in calculating the marital estate. When the distribution of the marital estate is examined without including the \$18,000 "debt" to Wife's sister, Wife received 53.41% of the marital estate.

As we discussed earlier, dividing marital property is not a mechanical process and the focus is to be on an equitable division, not an equal division. *Jolly*, 130 S.W.3d at 785; *Fisher*, 648 S.W.2d at 246. Moreover, it is not the role of the appellate court to tweak the manner in which a trial court divides marital property. *Morton*, 182 S.W.3d at 834. Instead, our role is to determine whether the trial court applied the correct legal standards, weighed the factors in Tenn. Code Ann. § 36-4-121(c) with logic and reason, and made a division of the marital property that is equitable. *Jolly*, 130 S.W.3d at 785-86; *Kinard*, 986 S.W.2d at 231. We have concluded that the trial court correctly fulfilled its duties and, therefore, affirm the division of the marital estate.

IN CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in all respects. This matter is remanded with costs of appeal assessed against the appellant, Wife.

FRANK G. CLEMENT, JR., JUDGE